Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

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Quarterly Production and Activity Report

January 1 to March 31, 2007

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Production Summary

- The active inventory totalled 5,173 (29% over the target of 4,000 cases). This is an encouraging reduction from an active inventory figure of 5,228 recorded at December 31, 2006.

- Incoming appeals numbered 1,030; of these, 834 were appeals from WSIB decisions and 196 appellants advised they were ready to proceed to hearing following a period of inactive status.
  - This compares to 847 new appeals and 161 reactivated appeals recorded in the fourth quarter of 2006.
  - In the 1st quarter of 2006 the Tribunal recorded 960 new appeals and 184 re-activations.
  - In 2006, the weekly average of hearing ready appellants was 64. For Q1 2007, the weekly average of hearing ready appellants is 71. This figure excludes cases reactivated from inactive status.

- Dispositions numbered 1,152; this includes 382 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 770 after hearing dispositions; of the after hearing dispositions, 737 followed from Tribunal decisions.

- The inactive inventory decreased by 116 cases to 4,119 (at the end of Q4-06, the inactive inventory was 4235 cases).

- In Q1 2007, 82% of final decisions were released within 120 days. In 2006, 81% of final decisions were released within 120 days.

- The Appeals Tribunal remains unable to offer hearing dates within four months of the appellant confirming hearing readiness by filing a Confirmation of Appeal form. Recent appointments and re-appointments will enable an increase in the hearing schedule to address the volume of cases.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are currently being tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the first quarter of 2007, the notice inventory included 1,353 dormant cases, the active inventory totaled 5,173 cases, and the inactive inventory totaled 4,119 cases.

Production Charts

A. Active Inventory

Period	Active Inventory
Q1-2005	5156
Q2-2005	5351
Q3-2005	5378
Q4-2005	5288
Q1-2006	5319
Q2-2006	5417
Q3-2006	5493
Q4-2006	5228
Q1-2007	5173

B. Incoming Appeals

Period	Incoming Appeals
Q1-2005	1122
Q2-2005	1198
Q3-2005	1056
Q4-2005	1100
Q1-2006	1144
Q2-2006	1124
Q3-2006	1087
Q4-2006	1008
Q1-2007	1030

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
Q1-2005	1136	456	680
Q2-2005	1048	416	632
Q3-2005	1016	479	537
Q4-2005	1190	465	725
Q1-2006	1146	435	711
Q2-2006	1131	477	654
Q3-2006	1084	426	658
Q4-2006	1161	363	798
Q1-2007	1152	382	770

D. Inactive Inventory

Period	Inactive Inventory
Q1-2005	4190
Q2-2005	4243
Q3-2005	4237
Q4-2005	4286
Q1-2006	4309
Q2-2006	4349
Q3-2006	4302
Q4-2006	4235
Q1-2007	4119

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q1-2005	1551	20
Q2-2005	1506	-45
Q3-2005	1519	13
Q4-2005	1519	0
Q1-2006	1486	-33
Q2-2006	1381	-105
Q3-2006	1308	-73
Q4-2006	1420	112
Q1-2007	1353	-67

The Tribunal inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management.

Community Activities

In January, Tribunal Chair, Ian J. Strachan, spoke at the Annual meeting of the WSIB Appeals Branch. Mr. Strachan provided a Tribunal update to the Appeals Resolution officers including case load and judicial review activity.

In March, Tribunal Director Marsha Faubert met with the Ontario Legal Clinics Workers' Compensation Network to talk about the Tribunal's caseload and answer questions. Following from this meeting, the clinic portion of the Tribunal's worker referral sheet is being revised.

In the Winter 2007 issue of the Toronto Association of Law Libraries Newsletter, Director of Information Services, Alison Colvin, wrote about Knowledge Management initiatives at the WSIAT.

Also in March, Tribunal staff met with the Office of the Worker Advisor to discuss areas of mutual interest.

Also in January, Associate Counsel to the Chair Ann Somerville and Vice-Chair Bernard Kalvin were instructors at the Society of Ontario Adjudicators and Regulators (SOAR) adjudicator training course. Their topic was decision writing. They provided a group presentation and led small groups in decision writing exercises. Ms. Somerville is also a member of the planning committee for the 2007 Conference of Ontario Boards and Agencies (COBA).

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the first quarter of 2007, as well as the status of a court action, are set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. There are a number of other pending judicial reviews which were received after the completion of this quarter, or for which no action occurred during this particular quarter.

Judicial Reviews

1. Decisions Nos. 433/99 (June 24, 1999) and 433/99R (May 30, 2000)

A worker had a back injury in April 1979. From 1979 until 1990, there were no records of any back complaints in the Applicant's medical charts. In late 1991 he suffered from an episode of back pain. In 1993 he alleged to the Board that his back problems were related to the 1979 accident 14 years earlier. A report from the worker's specialist supported a link between the accident and the problems. The issue for the Vice-Chair was one of medical continuity, compatibility and

causation. The Vice-Chair concluded that the 1979 accident did not cause or contribute to the symptoms after 1990, and denied entitlement.

The judicial review was heard in Sudbury on October 5. A Divisional Court panel of Smith, Kent and Pierce reserved its decision. On November 15 the Divisional Court released its decision granting the application for judicial review and quashing *Decision 433/99* and *Decision 433/99R*.

The Court held that there were several errors in the Tribunal's fact finding which, although taken individually were small, the cumulative effect of the errors was at odds with the Tribunal's conclusion. While acknowledging the standard of review was patent unreasonableness, the Court held that the Tribunal's findings of fact were erroneous, and a rational conclusion cannot be based on erroneous fact finding.

This is the first time a decision of the Tribunal has been quashed on judicial review in twenty-one years. The Tribunal's Notice of Motion for Leave to Appeal and the Tribunal's factum have been filed.

2. Decision No. 855/03 (November 15, 2005)

The worker was a member of a union. Pursuant to the collective agreement, the employer made contributions on the worker's behalf to a benefit plan that provided health and dental care coverage, as well as pension plan coverage. The employer's contributions were based on the hours worked by the worker. Under the terms of the plan, part of the contributions were used to continue the worker's benefits and pension contributions for up to a year after an injury.

The worker was injured. He alleged that the employer's contribution to his benefits should be included in the calculation of his earnings for the purposes of workplace safety and insurance benefits. The worker's appeal was denied. The Vice-Chair held that Board policy did not include benefit payments and pension plans in earnings basis. There was no direct relationship between the employer's contributions and the benefits the worker received. The Vice-Chair also held that the Legislature did not intend to include contributions from all employers in Ontario in the earnings of workers, or that some workers would receive non-taxable income.

The worker commenced an application for judicial review. The Tribunal has filed its factum. The Board successfully brought a motion to intervene in the judicial review. This case was to be heard in January of 2007, but was adjourned on consent of all parties. It will now be heard in June.

3. Decisions Nos. 1402/03 (January 19, 2004) and 1402/03R (August 19, 2005)

An injured worker had his benefits based upon the actual wages his employer paid him. The worker alleged that the wages that were paid were too low, and that under the collective agreement he should have been paid by the employer at a higher rate. The Tribunal held that it did not have the jurisdiction to interpret a collective agreement, and whether the correct wages were paid was a Labour Relations matter. The worker had not sought a remedy under the collective agreement. The Tribunal found that the amount the worker was paid was the amount to be used in the calculation of benefits, and the Tribunal did not have the jurisdiction to consider what should have been paid.

The worker commenced an application for judicial review of the Tribunal's decisions. The judicial review was heard before a Divisional Court panel of Matlow, Jennings and Carnwath on March 9. The Court reserved. At the end of the quarter the decision had not been released.

4. Decisions Nos. 2282/05 (May 17, 2006) and 2282/05R (August 29, 2006)

A chambermaid at a motel claimed that she was sexually assaulted by K, one of the owners of the motel. The motel was owned by a partnership. She brought an action against the owners. The defendants applied to determine whether the plaintiff's right of action was taken away.

Although the defendants denied the allegations, they agreed for the purposes of the Tribunal application that the allegations were true.

The Panel found the right of action was taken away against all the defendants, except K. The plaintiff was a worker of a Schedule 1 employer, and the sexual assaults were accidents within the meaning of the Act. However the assaults by K were outside the scope of employment, and he could not be considered to be an employer at the time of the assaults. The Act did not intend to protect employers from actions for deliberate assaults against workers.

A request for reconsideration was denied in Decision 228/05R. The defendants commenced an application for judicial review in 2006.

In February of 2007 the defendants filed a Notice of Abandonment of the judicial review.

5. Decisions Nos. 18/88I (March 22, 1988) and 18/88 (October 27, 1988)

In 1988 the Tribunal heard an appeal from the worker for further benefits. The worker believed that the WSIB had wrongfully released his medical information to his employer. In his view, because the Board had released his information, the Tribunal had no jurisdiction to hear the appeal.

The Panel did not agree and rendered a decision that the Tribunal had jurisdiction to hear his appeal. As the Panel commented, it was not clear what the worker's remedy would be if he couldn't appeal to the Tribunal.

Fifteen years later, the worker commenced an application for judicial review of the Tribunal's decision. He sought relief under the Charter against the Board and Tribunal, as well as various other novel remedies. While preparing to file a further motion, it was discovered that the Applicant had been declared a vexatious litigant in another proceeding. Under s.140 of the *Courts of Justice Act*, a vexatious litigant can only proceed with a new proceeding if he gets leave of the Court.

The Applicant made numerous unsuccessful attempts in Superior Court and the Court of Appeal to overturn the finding that he was a vexatious litigant. Eventually the Court of Appeal decreed the Applicant could file no further materials with respect to that matter. The Applicant then sought leave to proceed only with the judicial review application.

In December 2005 Justice Sachs ruled that the judicial review application should be allowed to proceed. She also ordered that no further material relating to this application is to be accepted by the Court, if such material is inadvertently received the matter will not be listed, and if listed it should be removed from the list without a hearing.

Section 140(4)(e) of the Courts of Justice Act states that "no appeal lies from a refusal to grant relief to the applicant".

In February 2007 the worker commenced yet another application under s.140, under a different style of cause, for leave to continue the application for judicial review. On March 5, 2007 counsel for the Board and the Tribunal attended at the motion. Justice Colin Campbell denied the application for leave. Justice Campbell also stated that no further material could be filed by the worker until proof of all costs orders had been filed.

Li v. Corrado, Workplace Safety & Insurance Appeals Tribunal, and Workplace Safety & Insurance Board

An injured worker's appeal was denied by the Board. She appealed that decision to the Tribunal. Subsequent to filing her appeal, the worker commenced a Small Claims Court action against the Board, the Board Appeals Resolutions Officer who made the decision, and the Tribunal.

It was not clear why the worker named the Tribunal as a defendant in the action. At the end of the quarter the Tribunal was preparing its Statement of Defence.

Highlights of Recent Decisions

Expert Evidence

Decision 2106 03 discussed various issues relating to the admissibility of expert evidence on questions of medical causation, in particular with respect to " novel science" evidence as referred to in *Dulong v. Merril Lynch Canada Inc.* (2006) 23 C.P.C. (6th) 172 (Ont. S.C.J.) citing *R. v.J-L.J.* [2000] 2 S.C.R. 600.

In that case a worker sought to have a professor with two Masters degrees qualified as an expert with respect to medical causation in fibromyalgia. The professor was not a medical doctor though he did conduct research in the area of the etiology of fibromyalgia.

The Vice Chair discussed the nature of expert evidence, its admissibility being an exception to general rule that opinion evidence is inadmissible. This evidence is inadmissible as the opinions of persons, other than the decision-maker, are irrelevant. Expert evidence then would only be admissible where its subject matter was beyond the knowledge and the experience of the decision-maker (see *Chan v. Erin Mills Town Centre Corp* [2005] O.J. No. 5027 (Ont. S.C.J.) and *Homolka v. Harris* [2002] B.C.J. No. 831 (B.C. C.A.)).

The Vice Chair then went on to review the criteria for the admissibility of expert evidence as set out in *R. v. Mohan* (1994) 114 D.L.R. (4th) 419 (S.C.C.) namely, that the evidence must be relevant; it must be necessary to assist the trier of fact; there must be no exclusionary rule otherwise prohibiting receipt of the evidence; and it must be given by a properly qualified expert.

The decision-maker has a role as gatekeeper in scrutinizing the admissibility of expert evidence and with that, comes the tension between, on the one hand, affording the parties the opportunity to lead the most complete evidentiary record and the application of the rules of evidence (see *Dulong v. Merril Lynch Canada Inc.* supra.)

Where the evidence is "novel science" it should be under particular scrutiny by the decision-maker to meet the threshold of admissibility. One consideration in this regard would be whether such evidence has been peer-reviewed.

The Vice Chair refused to qualify the professor as an expert witness. In doing so, the Vice-Chair considered that the etiology of fibromyalgia was not in issue in the case and given the nature of the evidence, the witness did not have sufficient qualifications to provide such evidence.

Election-Out of Province

Decision No. 76 06 addressed the issue of whether a worker could re-elect to claim compensation benefits in Ontario after he had made a prior compensation claim in Quebec.

In that case the worker suffered a back injury while working at a mine in Quebec. He received benefits from the Quebec Board. In 1999, the worker filed a claim with the Ontario Board for a recurrence of the 1986 injury. The Vice Chair found that the employer which was an affiliate of and subsequently merged with an Ontario company, was an employer covered under the Ontario workers' compensation system.

As the accident occurred in 1986, the Vice Chair found that section 6(1) of the pre-1989 *Workers' Compensation Act* applied to this case. The Vice Chair then found that the presumption in section 7(1) of the Act was rebuttable but that in this case there was no such evidence to rebut the presumption. Furthermore, referring to Tribunal *Decisions Nos. 764/91* and *1123/87, 548/96* and *2273/01,* it was found that that there was no basis to revoke a prior election as no exceptional circumstances were present in this case.

The worker had pursued the claim in Quebec and had received substantial benefits, with a possibility of further appeal to receive additional benefits. Re-election would not serve the administration of this claim. It could lead to duplicate benefits and would be an inefficient use of the Ontario Board's administrative resources.

Asthma- Second-Hand Smoke

Decision No. 1746 05 granted the worker entitlement to benefits for chronic bronchitis and asthma as resulting to her exposure to second-hand smoke in the workplace. The worker was a waitress for 25 years. She was a lifelong nonsmoker though her husband smoked a few cigarettes at home on some evenings.

The Panel accepted the opinion of a Tribunal medical assessor that the worker was not suffering from chronic obstructive lung disease and that her reported breathlessness was not related to lung disease. However, the worker was suffering from chronic bronchitis and asthma.

The Panel accepted the worker's testimony that she had neither a family nor a personal history of asthma. Also from the medical evidence, there was no indication that the worker had suffered from a serious respiratory viral infection that would have likely caused an asthma condition. Hence none of the risk factors enumerated above were present in this case.

Weighing the possible theories of causation in this case, the Panel found that the work exposure to secondhand smoke was the most likely and according to the expert medical evidence, one that was beyond mere speculation. The Panel, on a balance of

probabilities found that the worker was entitled to benefits for chronic bronchitis and asthma.

Reconsideration- Party Returning with Issue Withdrawn at Original Hearing

Decision 596 00 R2 addressed a reconsideration of a worker's representative respecting a prior withdrawal of an issue at the original hearing by the worker's former representative.

The original decision considered a number of issues related to temporary and FEL benefits. At the original hearing, the worker's representative withdrew from appealing the issue of the deduction of CPP disability benefits from the worker's R1 FEL award.

The prior representative demonstrated a satisfactory understanding of the law, policy and facts of the case. As the worker's representative, he requested withdrawal of the offset issue. That he may not have had full knowledge of the basis for the decision to grant CPP disability benefits or obtain the express consent of the worker for the withdrawal of the offset issue at the hearing were matters that the worker could pursue with the prior representative. The Vice-Chair noted that the worker did not raise any concern at the original hearing about the representative's authority.

The application to reconsider was denied. The Vice Chair requested further submissions from the new representative with respect to his alternate request for a time extension to appeal the issue that was formerly withdrawn.

S. Adams
April 2007